now become the prevailing rule. However, even if the Court should conclude that the majority opinion in Francis should stand, we insist that the passes involved in this case were not gratuitious and the waiver of liability provisions were invalid in any event.

I

The Passes Here Were Not "Matters of Charity" or "Mere Gratuities".

The fact that a pass is issued by the carrier without the payment of fare does not make it a free pass. So long as the carrier receives any consideration, direct or indirect, actual or anticipated, from the carriage of the passenger the pass is not free in the sense that the Courts will enforce the waiver of liability provision. New York C. R. v. Lockwood 17 Wall (U. S.) 357, 21 L. Ed. 627; Grand Trunk Ry. Co. v. Stevens 95 U. S. 655, 25 L. Ed. 535; Norfolk Sou. R. Co. v. Chatman 244 U. S. 276, 61 L. Ed. 1131.

Lockwood and Stevens were decided before the passage of the Hepburn Act but the Court in Chatman said: "The settled rule of policy established by the Lockwood case and the decisions following it must be considered unmodified by the Act to Regulate Commerce".

The question necessarily arises as to what constitutes consideration for the passes in this case. One answer is that the passes were earned by Holeman by more than twenty years of service to the railroad.

In Martin v. Greyhound Corp. (1955) [illegible] 2nd. 501, an employee and his wife riding on passes issued pursuant to the terms of a union contract were held to be passengers for hire. There Martin, a Greyhound employee, received trip passes for himself and his wife under the terms of a union contract with the Company. His wife was fatally injured and his suit was dismissed upon a holding that the passes

were gratuities, so that the stipulations against liability were valid. The case was reversed and remanded, the Court of Appeals for the Sixth Circuit writing in part:

> "The union agreement with Grephound provided that its members were entitled to receive trip passes for themselves and their families for such trips as seemed reasonable to the company . . . The obligation of the appellee was fixed by its union contract. The passes were in a real sense part of the compensation paid to appellant as member of the union . . .
>
> "That case (Charleston & S. C. R. Co. v. Thompson, supra) must, however, be considered in the light of its specific facts, the courts rationalization in respect to them, and whether in actuality, as in name, the pass is free . . .
>
> "The problem, as here presented, arises in an era of social, economic, and legal change which has mitigated harsh technical defenses to suits for recovery for negligent injury, has given new values to employee benefits, and new sanctions to their denials. Like all other so-called 'fringe benefits,' including hours and conditions of work, social security, paid vacations, hospitalization, etc., the issue of passes is also subject to collective bargaining, and, like other benefits, is a thing of value, subject no doubt to the revenue laws when received . . . Such climate should and has conditioned interpretation when interpretation is reasonably indicated to effectuate the Congressional purpose.
>
> "The issue as to whether the appellant and his wife were "passengers for hire" is to be resolved by federal and not by state law. It is not of any importance that the appellant's wife was not an employee of Greyhound, if the passes were not gratuitous."

The respondent attempts to distinguish the present actions because it is insisted the Martin case turns on a written agreement. But is this the spirit of the Court's interpretation? Does it not turn on whether the employee was entitled to the passes, quid pro quo? And can it be

reasonably argued that a contract in writing is the only foundation for such a right?

Floyd Holeman was not represented by a union. He had no written contract with L & N. His conditions of employment, hours, salary, seniority status, retirement plan, vacations - - all these and more were determined by established company policies, amounting to promises upon which Holeman was entitled to rely. So it was that he was entitled to receive, after twenty years of service, two system passes, one for himself and one for his wife. Where, then, is there any real distinction between his right and that considered by the Court in Martin.

A further consideration for the pass to Floyd Holeman is the fact that L & N, upon his assignment to New Orleans, assumed the obligation of paying his traveling expenses to and from New Orleans and his living expenses while there.

Certainly if he had been killed while enroute to New Orleans initially to assume his duties or while returning to Louisville after completion of his assignment, his transportation could not have been regarded as a matter of charity or as a mere gratuity. We insist that this view should apply with equal force to trips made between the commencement and the completion of his duties in New Orleans.

The record does not reveal how long it was expected Mr. Holeman would be engaged in the performance of his duties but it is certain it was expected to continue for several months. It could not be reasonably argued that he was expected to remain in New Orleans continuously from the time his work began until it was completed. The responsibility of transporting Holeman to New Orleans and returning him to Louisville extended to normal trips incident to spending holidays at his home. Had the holidays been spent in New Orleans, L & N would have been required to pay his living expenses during the holiday periods. His return to Louisville at such times relieved the railroad company of its responsi-

bility to defray the expenses for the days he was in Louisville.

This case is not unlike Sassamin v. Penn. R. R. Co. 144 F. 2nd. 950, decided by the Court of Appeals for the Third Circuit. There the employee traveled daily between his home and work over the lines of his employer. The Court refused to recognize the waiver of liability on the employee's pass upon the theory that transportation between his home and place of employment was part of the compensation for his services or was an incident of his employment. He was, therefore, regarded as a passenger for hire.

Can a distinction reasonably be drawn between the Sassamin case where the employee traveled daily between his home and work and in the present case where, on account of distance, the trips between home and work were less frequent?

II

The Pass Issued to Mrs. Holeman

Petitioner insists that the fact that Mrs. Holeman paid half fare to the pullman company, a portion of which was received by the railroad company, makes her a passenger for hire. It is conceded that the railroad company in effect receives a part of each pullman fare. If the operations of the pullman company result in a profit, L & N receives a share of the profit. If the pullman company has an operating deficit, the railroad company is required to assume a part of the deficit. The half fare paid by Mrs. Holeman either increased the profit or reduced the operating deficit of the pullman company.

The question of Mrs. Holeman's status is not controlled by how much the railroad received out of the fare which she paid. If it received or was entitled to receive any sum or benefit as a result of her trip, she was a passenger for hire.

The Court of Appeals of Kentucky lightly brushes aside the status of Mrs. Holeman with this observation:

> "While Mr. Holeman was traveling on a pullman pass and Mrs. Holeman on a half rate pullman ticket at the time of the accident, from which half fare the railroad company may possibly have derived some profit, we do not consider that as establishing her as such paying passenger as to vitiate the no liability provison on her pass."

Does the Court intend to establish the rule that no passenger is a passenger for hire unless full fare is paid? If full fare is not required, where is the dividing line between a free passenger and a passenger for hire?

Wherefore your petitioner respectfully prays that a writ of certiorari may be issued out of and under the seal of this Court, directed to the Court of Appeals of Kentucky to the end that the judgment of the Court of Appeals of Kentucky may be reviewed and reversed by this Court.

PARKER W. DUNCAN
Bowling Green, Kentucky
Counsel for Petitioner

DUNCAN & HUDDLESTON, Attorneys
1032 College Street
Bowling Green, Kentucky
Of Counsel for Petitioner

COURT OF APPEALS OF KENTUCKY

— APPENDIX —

PEARL HOLEMAN, Administratrix of the Estate of FLOYD HOLEMAN, Deceased . . . . . *Appellant*

V.

LOUISVILLE & NASHVILLE RAILROAD CO., INC. . *Appellee*

and

PEARL HOLEMAN. . . . . *Appellant*

V.

LOUISVILLE & NASHVILLE RAILROAD CO., INC. . *Appellee*

APPEAL FROM JEFFERSON CIRCUIT COURT

COMMON PLEAS BRANCH - FIRST AND THIRD DIVISIONS

Ben F. Ewing, Judge

OPINION OF THE COURT BY JUDGE MILLIKEN

AFFIRMING

The key question on this appeal is whether the carrier is absolved of liability for ordinary negligence by the provisions to that effect governing the acceptance of free passes by an employee and his wife.

Floyd Holeman, an employee of the Louisville & Nashville Railroad Company, died as a result of injuries received when L & N Train No. 98, the northbound Pan American, was derailed near Nashville, Tennessee, on July 3, 1954. His wife, Pearl Holeman, was injured in the same accident. Both Mr. and Mrs. Holeman were traveling from New Orleans to Louisville to visit their daughter on annual system passes, each of which provided: "The person accepting and

using it thereby assumes all risk of accident to person or property." Both the action to recover for Mr. Holeman's death and the action to recover for Mrs. Holeman's injuries were disposed of by directed verdicts for the Railroad and are consolidated on this appeal because controlled by the same law.

While Mr. Holeman was traveling on a Pullman pass and Mrs. Holeman on a half-rate Pullman ticket at the time of the accident, from which half-fare the Railroad may possibly have derived some profit, we do not consider that as establishing her as such a paying passenger as to vitiate the no liability proviso on her pass. The additional fact that the passes were not signed by the Holemans, as technically required for their acceptance, was disposed of in an analogous situation by Mr. Justice Holmes in Boering v. Chesapeake Beach Railway Company, 193 U. S. 442, 48 L. Ed. 742, 24 S. Ct. 515, when he wrote: "Accepting the privilege she was bound to know the condition thereof * * * the duty rests upon the one receiving the privileges to ascertain those conditions * * *."

We conclude that the circumstances of the present actions come clearly under the general rule reiterated in 1948, but not without a most persuasive dissenting opinion, by the Supreme Court in Francis v. Southern Pacific Company, 333 U. S. 445, 92 L. Ed. 798, where, after reviewing prior opinions on the subject and subsequent Congressional amendments to the governing statute, the Hepburn Act (49 U. S. C. A. 1 (7), the Court concluded that Congress had not wished to modify the Court's decisional law upholding the legality of the waiver of liability provision on employees' passes. Since the Federal law is controlling and our own decisional law is in accord therewith, Cincinnati, N. O. & T. P. Ry. Company v. Hansford, 305 Ky. 854, 205 S. W. 2d 346, we conclude that the trial court ruled properly in directing verdicts for the Railroad on the facts of the present cases.

because here the passes were customary gratuities to a faithful employee and his wife, and were not part of the consideration of employment, Francis v. Southern Pacific Company, above.

The judgments are affirmed.

Attorney for Appellant:

PARKER W. DUNCAN,
Bowling Green, Kentucky.

Attorneys for Appellee:

ROBERT P. HOBSON,
Louisville, Kentucky.

WOODWARD, HOBSON & FULTON,
Louisville, Kentucky.